

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

Renato Ariza Dominguez and Maria Clara  
 Leonor Rivera Cordero, as surviving parents of  
 decedent, Francisco Javier Dominguez Rivera,  
 and as successors in interest,

CV 08-648 TUC DCB (BPV)  
 (Lead)

Plaintiffs,

v.

Nicholas William Corbett,

Defendant.

Renato Ariza Dominguez, individually as the  
 surviving father of Francisco Javier  
 Dominguez, and as Successor-in-Interest to the  
 Estate of Francisco Javier Dominguez Rivera,  
 Maria Clara Leonor Rivera Cordero,  
 individually as the surviving Mother of  
 Francisco Javier Dominguez, and as Successor-  
 in-Interest to the Estate of Francisco Javier  
 Dominguez Rivera,

CIV 09-474 TUC DCB (BPV)  
 (Consolidated)

Plaintiffs,

v.

The United States of America; Nicholas  
 William Corbett; United States Border Patrol  
 Agents 1-100; Unknown Named Supervisory  
 Agents 1-100; U.S. Department of Homeland  
 Security; U.S. Customs and Border Protection;  
 United States Border Patrol; U.S. Immigration  
 and Customs Enforcement Agency; United  
 States Department of Justice,

**REPORT AND  
 RECOMMENDATION**

Defendants.

Pending before the Court is Plaintiffs' Motion for Leave to File Second Amended  
 Complaint (Doc. 40). Submitted in support of Plaintiffs' motion is a proposed second

1 amended complaint (Doc. 41), a declaration by Plaintiffs' counsel (Doc. 42) and Exhibits  
2 1 through 5 (Docs 43-45). A response to the motion was filed by Defendant United  
3 States (Doc. 46), which was joined by Defendant Nicholas Corbett (Doc. 47), and a reply  
4 was filed by Plaintiffs (Doc. 48).

5 The case has been referred to Magistrate Judge Velasco for all pretrial matters  
6 pursuant to Local Civil Rule 72.2. Rules of Practice of the U.S. District Court for the  
7 District of Arizona.

8 For reasons which follow, the Magistrate Judge recommends that the District  
9 Court GRANT Plaintiffs' Motion For Leave to File Second Amended Complaint.

10 **I. FACTUAL AND PROCEDURAL BACKGROUND**

11 On December 10, 2008, Plaintiffs filed a claim against Defendant Nicholas Corbett  
12 alleging violations of the United States Constitution and civil rights violations: CV 08-  
13 648 TUD DCB. ("*Bivens*<sup>1</sup> Complaint") On August 24, 2009, Plaintiffs filed a federal tort  
14 claim against Defendant Corbett and the United States Government: CV 09-474 TUC  
15 BPV. ("FTCA Complaint") Both cases involve the use of deadly force against decedent  
16 Francisco Javier Dominguez Rivera ("Dominguez") by Defendant Corbett on January 12,  
17 2007, when Dominguez was apprehended after illegally crossing the Mexico-United  
18 States border. On September 11, 2009, the District Court consolidated the two suits.  
19 (Doc. 18.)

20 Following Defendant United States' filing of a motion to dismiss and strike  
21 portions of the first complaints, Plaintiffs filed amended complaints in both the *Bivens*  
22 and federal tort claims action. (Doc. 21 ("Amended *Bivens* Complaint") and 22  
23 ("Amended FTCA Complaint").) Thereafter, Defendant United States filed a motion to  
24 dismiss and to strike portions of the first amended complaints. (Doc. 23.)

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26 <sup>1</sup> *Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics*,  
27 403 U.S. 388 (1971)

1 The District Court adopted the Magistrate Judge's recommendation that the second  
2 claim of the *Bivens* Complaint and the third claim of the Amended FTCA Complaint be  
3 dismissed with prejudice as to allegations of constitutional violations and allegations of  
4 negligent hiring, supervision and retention. (Doc. 38)

5 The District Court also adopted the Magistrate Judge's recommendation that the  
6 Defendants' motion to dismiss be granted without prejudice as to the portion of the third  
7 claim of the Amended FTCA Complaint alleging that policy-making defendants  
8 promulgated policies and practices condoning misconduct, criminal activity and  
9 constitutional violation, and the second claim of the Amended FTCA Complaint. (*See*  
10 *Id.*)

11 As to the claims dismissed without prejudice, the Magistrate Judge allowed  
12 Plaintiff to seek leave to file a second amended complaint curing the deficiencies in the  
13 amended complaint. (Doc. 39)

## 14 **II. SECOND AMENDED COMPLAINT**

15 On October 5, 2010, Plaintiffs filed a motion for leave to file a second amended  
16 complaint (Doc. 40) and lodged a proposed second amended complaint ("Second  
17 Amended Complaint") with the Court (Doc. 41).

18 Defendants assert that the motion for leave to file should be denied because 1) the  
19 Second Amended Complaint contains *Bivens* and negligent supervision claims that the  
20 District Court previously dismissed with prejudice, and 2) Plaintiffs failed to cure the  
21 deficiencies of the third claim brought under the FTCA, and, 3) even if Plaintiffs had  
22 cured the deficiencies noted by the Court, this Court would still lack jurisdiction over  
23 such a claim under the FTCA, thus further amendment of the third claim would be futile.  
24 (Doc. 46)

### 25 **A. Bivens claims**

26 Defendant argues that paragraph 90 and paragraph 12 of the second amended  
27 complaint are an attempt by Plaintiffs to circumvent the District Court's order dismissing  
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1 the claim with prejudice and resurrect the previously dismissed *Biven's* claim. Plaintiffs  
2 argue that a reading of the second amended complaint will demonstrate they have  
3 removed the supervisory responsibility claim. A review of the complaint verifies  
4 Plaintiffs' assertion; Plaintiffs have deleted the entire second claim of the *Bivens'*  
5 Complaint. The two paragraphs noted by Defendant were in fact present verbatim in the  
6 first amended complaint, making it less likely to be an attempt to circumvent the District  
7 Court's order, and more likely an oversight in both Plaintiffs' and Defendant's failure to  
8 notice the objectionable material in the permissible *Bivens'* claim. These two paragraphs  
9 do not, by themselves, resurrect the objectionable claim. The Magistrate Judge is  
10 confident that any future attempt to actually resurrect the supervisory responsibility  
11 *Bivens'* claim will be adjudicated promptly and fairly. Plaintiffs are advised however, for  
12 the sake of clarity, to remove reference in any future amended complaint to unnamed  
13 border patrol agents as party to the *Bivens'* action.

14 B. The Negligent Supervision FTCA Claim

15 The District Court considered Plaintiffs' negligent hiring, retention and  
16 supervision claim (the Third FTCA Claim in the Amended FTCA Complaint) and  
17 dismissed with prejudice those portions claiming negligent supervision because, the Court  
18 found, it lacked subject matter jurisdiction over those portions, which could not be cured  
19 by amendment, because decisions of whether and how to retain and supervise an  
20 employee, as well as whether to warn about his dangerous proclivities, are the type of  
21 discretionary judgments that the discretionary function exception of 28 U.S.C. § 2680(a)  
22 to the FTCA's general waiver of immunity was designed to protect.

23 "Federal courts do not have subject matter jurisdiction over tort actions based on  
24 federal defendants' performance of discretionary functions." *Garcia v. United States*, 826  
25 F.2d 806, 809 (1987); 28 U.S.C. § 2680(a). The Supreme Court has established a two-  
26 step analysis for determining whether the exception should be applied: The first inquiry  
27 is whether the challenged action involved an element of choice or judgment, for it is clear

1 that the exception “will not apply when a federal statute, regulation, or policy specifically  
2 prescribes a course of action for an employee to follow.” *Berkovitz v. United States*, 486  
3 U.S. 531, 536 (1988). If choice or judgment is exercised, the second inquiry is whether  
4 that choice or judgment is of the type Congress intended to exclude from liability—that is,  
5 whether the choice or judgment was one involving social, economic or political policy.  
6 *Id.* The government carries the burden of showing that the exception applies. *Whisnant*  
7 *v. United States*, 400 F.3d 1177, 1180 (9<sup>th</sup> Cir. 2005).

8 While “decisions relating to the hiring, training, and supervision of employees  
9 usually involve policy judgments of the type Congress intended the discretionary function  
10 exception to shield;” *see Vickers v. United States*, 228 F.3d 944, 950 (9<sup>th</sup> Cir. 200); *see*  
11 *also Nurse v. United States*, 226 F.3d 996, 1001-02 (9<sup>th</sup> Cir. 200) (applying the exception  
12 to negligent and reckless employment, supervision and training), this does not “short-cut  
13 the two-step analysis, which typically involves the examination of ‘governmental policy,  
14 as express or implied by statute, regulation, or agency guidelines.’” *Milano v. Aguilerra*,  
15 2011 WL 662973 (S.D. Cal)(quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)).  
16 If the discretionary function exception is found to apply, it applies whether or not the  
17 policy-making defendants’ actions or inactions were negligent or an abuse of discretion.  
18 *See generally Nurse, supra; Vickers*, 228 F.3d at 950; 28 U.S.C. 2680(a).

19 While the government has the discretion to decide how to carry out its  
20 responsibilities, it does not have discretion to abdicate its responsibilities, and “[w]hen it  
21 does so, the discretionary function exception cannot shield the government from FTCA  
22 liability for its negligent conduct.” *Whisnant v. United States*, 400 F.3d 1177, 1183  
23 (2005). This Court considered Defendants’ motion to dismiss Plaintiffs’ previous claim  
24 in the amended complaint and found that, although the Court lacked subject matter  
25 jurisdiction over the portions of Plaintiffs claim that alleged negligent hiring, retention  
26 and supervision, which could not be cured by amendment, Plaintiffs had alleged grounds  
27 for relief that fell outside the discretionary function exception, and, though Plaintiffs had  
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1 failed to allege sufficient factual matter in support of such a claim, the claim could be  
2 saved through amendment. This Court therefore recommended dismissing with prejudice  
3 the portion of the claim alleging a constitutional tort, and claims of negligent hiring,  
4 supervision and retention, and dismissing without prejudice those portions of the  
5 complaint that allege policy-making defendants promulgated policies and practices  
6 condoning misconduct, criminal activity and constitutional violations. The District Court  
7 adopted the recommendation.

8 Plaintiffs have now alleged that the United States, through the United States  
9 Border Patrol, and Unknown Border Patrol Supervisors, “instituted and maintained the  
10 existence of United States Border Patrol customs, policies, practices and procedures the  
11 purpose of some of which was to approve, ratify and condone acts of misconduct of  
12 agents within the ranks of the United States Border Patrol, including Defendant Corbett,”  
13 and “established a custom and practice of condoning and ratifying misconduct and  
14 criminal activity, and tolerating a pattern of constitutional violations.” (*Id.*, ¶¶ 29, 66)

15 Further, Plaintiffs alleged that the United States Border Patrol “has engaged in,  
16 encouraged and condoned a systematic pattern of unconstitutional use of deadly force  
17 against Mexican citizens who cross the international border between the United States  
18 and the Republic of Mexico. These unconstitutional practices and policies have been  
19 specifically applied at the Douglas Border Patrol station and have led to the unjustified  
20 and unconstitutional shooting of Mexican citizens and ultimately to the wrongful death of  
21 Francisco Javier Dominguez Rivera.” (*Id.*, ¶ 32.)

22 Specifically, Plaintiffs allege that it is the custom policy and practice for United  
23 States Border Patrol supervisors, in violation of written policies, to not enforce reporting  
24 requirements regarding shootings or shots fired, and refusing and failing to take  
25 appropriate steps for violation of firearms policies, that this condones and encourages the  
26 behavior of United States Border Patrol agents shooting at Mexican citizens and tacitly  
27 condones the disregard of written policies by the agents. (*Id.*, ¶ 50) Plaintiffs allege that

1 United States Border Patrol agents practice a wrongful and negligent use of firearms,  
2 consisting of shooting persons encountered in the general vicinity of the United States  
3 border without regard to whether the agents are in any danger or whether the suspect  
4 individuals are armed or engaged in any illegal activity, and that, in fact, a significantly  
5 higher number of shootings have occurred along the international border between the  
6 United States and Mexico, but that these shootings and other physical and verbal abuse  
7 have gone unreported by the United States Border Patrol agents, and that United States  
8 Border Patrol, specifically the supervisors at the Douglas Border Patrol stations (*Id.*, ¶ 53)  
9 have had reason to know of the significant number of unreported incidents and have  
10 failed to investigate the information concerning abuse by their agents, and have had a  
11 custom and practice of condoning and ratifying misconduct and criminal activity in  
12 regards to unauthorized shootings, and practices such as punitive beatings of suspects.  
13 (*Id.*, ¶ 51-52, 66(4), 66(18))

14 These claims sufficiently address the deficiencies raised in this Court's previous  
15 report and recommendation. *See Whisnant v. United States*, 400 F.3d 1177, 1185 (9<sup>th</sup> Cir.  
16 2005) (district court erred in dismissing plaintiff's allegations that the government  
17 ignored reports and complaints describing the unsafe conditions, knew or should have  
18 known dangerous conditions, and intentionally or recklessly or both intentionally and  
19 recklessly permitted employees and customers to work and shop at a commissary in spite  
20 of the health hazards); *United States v. Raz*, 343 F.3d 945 (8<sup>th</sup> Cir. 2003) (discretionary  
21 function exception to waiver of United States' sovereign immunity does not apply to  
22 preclude tort claims by plaintiff alleging that FBI agents conducted surveillance activities  
23 in violation of First and Fourth amendment rights); *Vickers*, 228 F.3d at 953 (Although  
24 INS investigators enjoy discretion in the conduct of an investigation, this discretion does  
25 not extend to the question of whether to report to superiors or to investigate at all an  
26 allegation of misuse of Service-issued firearms; failure to report or to investigate  
27 therefore constituted a failure to follow the mandatory requirements proscribed by agency



1 regulations as implemented by policy guidelines and thus FTCA's discretionary function  
2 exception does not apply).

3 Additionally, Plaintiffs allege that Defendant United States "possessed the  
4 knowledge that Corbett engaged in aggressive altercations with others that reflected a  
5 pattern that made him unsuitable to be retained as a U.S. Border Patrol Agent"...and  
6 despite this knowledge and because of the practice of condoning deprivations of  
7 constitutional rights, Defendant UNITED STATES failed to recognize such criminal and  
8 discriminatory behavior on the part of Corbett "*even though it confirmed that it was*  
9 *inappropriate to maintain Corbett's employment* with the United States Border Patrol,  
10 and this failure to terminate Corbett's employment directly and proximately resulted in  
11 DECEDENT's death on January 12, 2007." (*Id.*, ¶ 70)(*emphasis added*)

12 The Magistrate Judge finds that this paragraph of the claim sufficiently states that  
13 Defendant United States acted outside its discretion in violation of legal mandate to retain  
14 Corbett, and finds that the Court has jurisdiction over such claim.

15 Defendants argue that amendment would still be futile because this Court would  
16 lack jurisdiction over such a claim under the FTCA. The FTCA only authorizes tort  
17 actions against the United States "under circumstances where the United States, if a  
18 private person, would be liable to the claimant in accordance with the law of the place  
19 where the act or omission occurred." 28 U.S.C. § 1346(b)(1). "[T]he United States waives  
20 sovereign immunity 'under circumstances' where local law would make a 'private  
21 person' liable in tort." *United States v. Olson*, 546 U.S. 43, 44-45(2005). Defendant  
22 argues that Plaintiffs have not alleged an Arizona state law tort duty that was breached,  
23 nor is there an applicable private person analog under Arizona tort law. The United States  
24 believes there is no such tort liability for a private individual under like circumstances.  
25 For these reasons further amendment of the third claim would be futile.

26 Plaintiffs respond that they have made a routine negligence claim. Such claims  
27 are, not surprisingly, cognizable under Arizona law. *See Gipson v. Kasey*, 214 Ariz. 141,



1 143 (elements of claim for negligence under Arizona law). Plaintiffs have alleged that  
2 Defendants had a duty to promulgate policies, practices and procedures that do not  
3 condone misconduct, criminal activity, or constitutional violations (§ 67(b)), that  
4 defendants were negligent in their duties, in fact, promulgating policies, practices and  
5 procedures that condoned misconduct, criminal activity and constitutional violations (§ §  
6 29, 32, 50-53, 66, 70); resulting directly and proximately in the death of decedent (§ 75).

### 7 **III. RECOMMENDATION**

8 For the reasons stated above, the Magistrate Judge recommends that Defendants'  
9 motion to amend (Doc. 40) be GRANTED.

10 Pursuant to Title 28 U.S.C. § 636(b), any party may serve and file written  
11 objections within fourteen (14) days after being served with a copy of this Report and  
12 Recommendation. A party may respond to another party's objections within fourteen (14)  
13 days after being served with a copy thereof. Fed.R.Civ.P. 72(b). If objections are filed  
14 the parties should use the following case number: **CV 08-0648-TUC-DCB (lead) and**  
15 **CV 09-474-TUC-DCB (consolidated).**

16 If objections are not timely filed, then the parties' right to *de novo* review by the  
17 District Court may be deemed waived. See *United States v. Reyna-Tapia*, 328 F.3d 1114,  
18 1121 (9<sup>th</sup> Cir. 2003) (*en banc*).

19 DATED this 24<sup>th</sup> day of March, 2011.

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23 Bernardo P. Velasco  
24 United States Magistrate Judge  
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